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Opinion No. 58-72

REQUESTED BY: Honorable Earl W. Cooke
State Senate

OPINION BY: ROBERT MORRISON, Attorney General

QUESTION: How many houses, if any, may a person
construct and sell each year without
constituting a "contracting business"

CONCLUSION: See body of opinion.

A.R.S. § 32-1101 defines "contractor" to mean:

"* * * a person, firm, partnership, corporation,
association or other organization, or a combination
of any of them, who, for either a fixed sum, price,
fee, percentage, bonus or other compensation other
than actual wages, undertakes to or offers to undertake
to, or purports to have the capacity to undertake to, or
submits a bid to or does himself or by or through others,
construct, * * * any building, * * *"

The legislature has provided specific exemptions to this definition.
Until the 1958 Session Laws, A.R.S. § 32-1121 (4) provided that:

"This chapter shall not be construed to apply to:

* * * * *

4. Sole owners of property building or improving
structures thereon for the use and occupancy of such
owners and their families and not intended for sale,
* * * " (Emphasis supplied)

It is plain from this language that a person could build a house for
himself and his family without constituting a "contractor", so long as he
did not intend it for resale.

However, under Chapter 40, Session Laws of 1958, the legislature
amended the foregoing A.R.S. § 32-1121, subdivision 4, to read as follows:

"This chapter shall not be construed to apply to:

* * * * *

4. Owners of property who build structures thereon for
the occupancy of such owners and which structures are not
offered for sale. In all actions brought under this chap-
ter, proof of the sale or offer for sale by the owner-
builder of two such structures, not constructed by a
licensed contractor, within a period of one year after
completion of such structures is prima facie evidence
that the structures were undertaken and constructed for
purposes of sale. In this chapter the term 'sale' includes

any arrangement between two or more persons as a result of which there is an agreement to transfer property for a consideration." (Emphasis supplied)

Prior to the 1958 amendment, the burden was upon the adverse party to prove that an owner-builder had built a house for resale. This required proof of a person's "intention", which is sometimes difficult, if not impossible, to prove.

The amendment, therefore, made the burden of proof easier by providing that the sale by the builder of two structures within a year after their completion is prima facie evidence that they were constructed for resale.

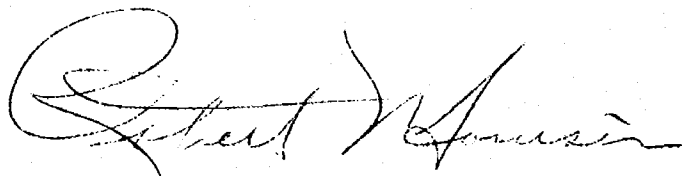
The answer to the question, then, is this:

There is no fixed limit on the number of structures a builder who is not a "contractor" may build on his property for his own occupancy, within a year.

However, if he builds, and sells, or offers for sale, two structures within a year after their completion, then he is presumed to have built them for resale instead of his own use and would be required to be a licensed contractor unless he can overcome the presumption by other evidence showing that his intent was to build them for his own use.

The law as it now reads, retains the original intent of the legislature that an owner-builder cannot construct any building for resale without a contractor's license. If the owner-builder builds houses with the intention of selling them, it is the opinion of this department that such owner-builder cannot construct any houses without first obtaining a license to contract.

If there is no other way to ascertain or determine whether the builder has constructed for resale, then, under A.R.S. § 32-1121 (4), he is presumed to have constructed for sale if he sells two structures within a year of their completion.



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The Attorney General